PRIVY COUNCIL REPORTS

DATUK JAGINDAR SINGH & ORS. v. TARA RAJARATNAM

[P.C. (Lord Keith of Kinkel, Lord Wilberforce, Lord Brandon of Oakbrook, Lord Mackay of Clashfern & Sir Denys Buckley) October 28-30, November 4 & 5 & December 16, 1985]

[Privy Council Appeal No. 39 of 1983]

Legal Profession – Solicitor-client relationship – Transfer of land – Outright sale or security – Fraud – Breach of trust – Undue influence – Breach of agreement – Damages.

Land Law – Transfer of land – Whether outright sale or security – Fraud – Valuation – National Land Code, s. 340.

Contract – Fraud – Undue influence – Damages – Contracts Act 1950, ss. 16 & 24.

Tort – Fraud – Tort of deceit – Transfer of land – Breach of trust and undue influence by solicitors – Damages.

In this case the respondent had agreed to transfer her land at Kulai to the second appellant as security for an advance of $220,000 to the respondent on her account. The money was to be used to pay off a charge on the land and also to pay the first appellant an amount payable by the brother-in-law of the respondent for whom the first appellant had stood surety in getting an advance from a bank. The first and second appellants were advocates and solicitors who acted for the respondent in preparing the necessary documents.

The Transfer and Memorandum in favour of the second appellant were signed on March 30, 1974. The Transfer was registered on July 22, 1975. On July 31, 1975 the second appellant executed a transfer of the land in favour of the third appellant purportedly in consideration of $220,000 but no consideration in fact passed. Subsequently the land was again transferred to a land development company almost wholly-owned by the first appellant. The land was eventually subdivided and sold to the public.

The claim upon which the respondent had thus obtained judgment was based upon a number of grounds – fraud, breach of contract, undue influence and breach of trust. The learned trial judge found that fraud had been established against all three appellants and his finding was upheld by the Federal Court (see [1983] 2 M.L.J. 127 and 196).

The learned trial judge and the Federal Court were at one in holding that the first and second appellants were guilty of fraud in that they falsely represented to the respondent that the transaction of March 30, 1974 was of the nature of a security such as would enable her to redeem the property by repaying the sum of $220,000 at any time, when it was in fact an outright sale coupled with an option to re-purchase the property for that sum within a year, and further that they falsely represented that it was their intention to give effect to the transaction as a security one, when in fact they had no intention of allowing the respondent to redeem the property at any time. Both courts also found that the respondent had been induced by those misrepresentations to enter into the transaction.

This was an appeal from the judgment of the Federal Court affirming Abdul Razak J.'s judgment, whereby the appellants were ordered to pay the respondent by way of damages the sum of $973,000 with interest at 6% per annum on the sum of $370,260 from July 1975 till July 1982 and interest at 8% per annum on the judgment sum from November 21, 1982 (see [1984] 1 M.L.J. 175).

Held: (1) the whole evidence of facts and circumstances was amply sufficient to justify the finding that both the first and second appellants were jointly involved in bringing about the transaction with the respondent and that they were similarly motivated;

(2) there were no sufficient grounds, so far as the findings of fraud against the first and second appellants were concerned, for a departure from the practice whereby the Board refrains from disturbing concurrent findings of fact in the two courts below;

(3) the third appellant's appeal should be allowed by consent upon agreed terms. He had no hand whatever in the events of March 30, 1974, which form the basis of the respondent's case of fraud against the other appellants;

(4) the object of damages for the tort of deceit, as for other torts, is to put the injured party into as good a position financially as he would have been in if the tort had not committed;

(5) the learned trial judge was right in principle to take into account in the assessment of damages the value which the land, if the respondent had not been deprived of it, would have borne at the date of judgment;

(6) there can be no doubt that a judge is not entitled to use his own particular knowledge in arriving at an assessment of damages. In the general exercise of his judicial functions he is, however, entitled to rely on what is common and public knowledge. The scope of common and public knowledge may vary quite widely from one country to another. The fact of a fall over a period in the value of money or a rise in the value of land is a matter which is capable of being one of common and public knowledge. As to whether or not it is so in Malaysia is a question upon which their Lordships would hesitate to venture an opinion. The judiciary of Malaysia are the persons best qualified to answer the question. The learned trial judge has found the particular matter to be common and public knowledge there, and his finding has not been criticised by the Federal Court. Their Lordships were not prepared to interfere with that finding;

(7) the first and second appellants' appeal against affirmation by the Federal Court of the Order of Abdul Razak J. of July 17, 1982 should be dismissed, and their appeal against the Federal Court's affirmation of the Order of Abdul Razak J. of November 21, 1982 should be allowed to the effect only of substituting in that Order the sum of $797,000 for the sum of $973,000 and the date September 20, 1976 for the date July 1975. The respondent was not dispossessed of the land until September 20, 1976 and it is from that date, not July 1975, that the interest should run;

(8) the first and second appellants should pay the respondent seven-eighths of her costs before the Board.

[*Editorial note:* For earlier proceedings, see also [1979] 2 M.L.J. 172, [1981] 1 M.L.J. 97 & 232, FC.; [1983] 1 M.L.J. 71, FC.]

Cases referred to:

(1) *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy & Ors.* [1946] A.C. 508.

(2) *Haji Abdul Rahman & Anor.* v. *Mahomed Hassan* [1917] A.C. 209; 1 F.M.S.L.R. 290.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

T.L.G. Cullen, Q.C. (*Yusuf Jumabhoy* with him) for the 1st & 2nd appellants.

Colin Ross-Munro, Q.C. (*Ronald Khoo* with him) for the 3rd appellant.

Gavin Lightman, Q.C. (*H.E. Cashin & K.S. Jones (Miss)* with him) for the respondent.

Cur. Adv. Vult.

Lord Keith of Kinkel (delivering the Judgment of the Board): This is an appeal from a judgment dated May 16, 1983 of the Federal Court of Malaysia (Lee Hun Hoe C.J. (Borneo), Salleh Abas C.J. (Malaya) and Eusoffe Abdoolcader F.J.) dismissing an appeal from judgments dated July 17, 1982 and November 21, 1982 of the High Court of Malaya (Abdul Razak J.), whereby the appellants were ordered to pay the respondent by way of damages the sum of $973,000 with interest at 6% per annum on the sum of $370,260 from July 1975 till July 1982 and interest at 8% per annum on the judgment sum from November 21, 1982.

The claim upon which the respondent had thus obtained judgment was based upon a number of grounds – fraud, breach of contract, undue influence and breach of trust. The learned trial judge found that fraud had been established against all three appellants and his finding was upheld by the Federal Court.

The narrative of relevant events, so far as based on undisputed facts, is as follows. In 1973 Dr. Das, brother of the respondent's late husband, Devan, conceived the idea of opening in Singapore a medical computer centre called Medidata. For this purpose he required a large amount of finance, and he arranged a substantial loan from the Moscow Narodny Bank. He also approached the first appellant Jagindar Singh, an advocate and solicitor carrying on business in Johore in partnership with the second appellant Pakrisamy Suppiah, who is similarly qualified, under the firm name of Suppiah & Singh. The first appellant, a friend of Dr. Das from student days, agreed to guarantee for the latter an overdraft with the Hong Kong and Shanghai Bank ("HKS Bank") up to a limit of $120,000, and duly did so on October 8, 1973. The overdraft facility was drawn upon and the debit balance mounted up. About the beginning of 1974 the first appellant began to press Dr. Das to clear the overdraft or to provide security for the guarantee. Dr. Das offered a second mortgage over his dwelling house and business premises, already charged to the Moscow Narodny Bank. The first appellant rejected this and expressed interest in five acres of land at Kulai the title to which was registered in the name of the respondent and upon which stood the family home occupied by her and her husband and their five daughters. Devan had a certain beneficial interest in the property, but the greater part was owned by the respondent. This land was subject to three charges in favour of the Chung Khiaw Bank ("CK Bank") to secure an overdraft on current account in the name of Devan. Dr. Das agreed to seek the assistance of Devan, and the two of them later attended at the office of the first and second appellants to discuss matters. A number of further meetings took place between Devan and the first and second appellants. On March 12, 1974 Suppiah & Singh wrote to the CK Bank stating that they acted for the respondent and that the respondent wished to pay off the charges on her property at Kulai by charging it for an increased amount. They asked for a statement showing the amount due to the Bank on Devan's overdraft and for the title deeds to the property. On March 14, 1974 the Bank wrote to Suppiah & Singh stating that the sum at debit of Devan's account was $103,658.44 with interest at 11.5% per annum and enclosing the title deeds.

On March 30, 1974 the first and second appellants presented themselves at the respondent's house, together with a third person, Sivananthan, who appears to have accompanied them just for the ride in the first appellant's new Mercedes. The second appellant had in his possession an undated transfer in form 14A of the National Land Code bearing that the respondent thereby transferred the Kulai land to the second appellant in consideration of the sum of $220,000, an undated letter of confirmation that the dwelling house on the land was included in the transaction, and also a Memorandum in these terms:-

"I, TARA RAJARATNAM (f) NRIC No. 2317344 of No. 76, Main Road, Kulai, Johore, proprietor of the land described in the Schedule below and the house erected thereon and known as KLBSK 681, Kulai Besar, Kulai, Johore, hereby confirm that the consideration of $220,000.00 referred to in the Transfer executed by me in respect of the said land in favour of PAKRISAMY SUPPIAH of No. 33, Jalan Keruing, Kebun Teh Park, Johore Bahru is arrived at as follows:

(a) in consideration of the said P. SUPPIAH Paying the sum of Dollars $103,658.44 which is the amount due from me to the CHUNG KHIAW BANK Kulai Branch, as at 8.3.74 as stated in their letter dated 14.3.74 which is attached herewith and marked "A" on the Charges executed by me in their favour and a further sum of $6,341.56 (making in all $110,000.00) part of which is for additional interest payable to the said Bank as from 9.3.74 to the date of Transfer and the balance is to be received by me.

(b) a further sum of $110,000.00 is in consideration of the said P. SUPPIAH paying Datuk JAGINDAR SINGH of

No. 41, Jalan Waspada, Johore Bahru, being the amount payable by my brother-in-law Dr. Krishna Shivadas (also known as Dr. Das) of No. 25, Jalan Waspada, Johore Bahru, to the said Datuk JAGINDAR SINGH who will be paying to the HONG KONG & SHANGHAI BANK, Collyer Quay, Singapore the sum of $110,000.00, (which I hereby agreed), being the loan granted to my said brother-in-law by the said Bank on the guarantee given by the said Datuk JAGINDAR SINGH.

The Schedule referred to above

Mukim	*Lot No.*	*Description and No. of Title*	*Share of Land (if any)*	*Registered No. of lease/ sub-lease (if any)*	*Registered No. of Charge (if any)*
Senai Kulai	6025	Certificate of Title No. 13817 for area 5 acres 0 r. 00 p. or thereabouts	Whole	Nil	Nil

Dated this March 30th day of March, 1974."

Following some discussion, the second appellant dictated to Sivananthan an addition to the Memorandum, which the latter wrote down in manuscript at the end of it, in these terms:

"I, the abovenamed Pakrisamy Suppiah hereby confirm, agree, and undertake not to sell the said land and house to anyone for one year without the consent of the said Tara Rajaratnam (f) and further undertake to transfer the said land and house to her within one year in the event of her paying me the sum of $220,000.00 (Dollars two hundred and twenty thousand only) the consideration mentioned as above."

The Transfer and Memorandum were signed by the respondent and the manuscript by the second appellant. The first and second appellants and Sivananthan then left the house.

On April 27, 1974 the first appellant paid to the HKS Bank the sum of $121,819.80, being the amount then necessary to clear Dr. Das's overdraft. On June 10, 1974 the CK Bank wrote to Suppiah & Singh asking to be informed of the present position about the charges on the Kulai land. On June 13, Suppiah & Singh replied that they were preparing discharges and would send them for execution, and asked for details of the amount then due in respect of overdraft and interest. The Bank responded on June 21, stating the amount of the overdraft and interest to be $112,114.82, and on July 20, wrote to Suppiah & Singh again inquiring about the position, but received no reply. The Bank then wrote to Devan pressing him to reduce the overdraft and asking for a further charge for $30,000, which by letter dated September 20, 1974 Devan agreed to grant. On October 25, 1974 the Bank wrote to Suppiah & Singh asking for return of the title deeds to the land, as the discharges had not materialised. Suppiah & Singh replied on November 12, stating that steps were being taken to have the property discharged within 21 days, and on December 3, wrote again asking for the present state of the overdraft. The Bank by letter dated December 4, stated the balance due, including interest, to be $116,596.25, and asked for a cheque in settlement, which they again requested on December 9, and on December 26, they wrote asking for return of the title deeds to the land, since the amount due had not been paid. Suppiah & Singh replied on December 29, stating that they had written to "our clients" for instructions whether they would pay the balance due, and that they would return the title deeds within 10 days if nothing was heard from the clients. On January 21, 1975 the Bank wrote again to Suppiah & Singh pressing for return of the title deeds, which were in fact returned by the latter on January 30. On February 2, 1975 Suppiah & Singh wrote to the Bank in these terms:

"We act for our Mr. Suppiah to whom the owner of the above land Tara Rajaratnam had sold the property subject to the three charges namely:- Presentation No. 3060/67, Charge Bk. 126 Folio 72 (2) Presentation No. 4686/67 Charge Bk. 127 Folio. 89 and (3) Presentation No. 5731/72 Charge Bk. 10 Folio. 97 made by the said Tara Rajaratnam in your favour.

We would therefore appreciate it very much if you could be good enough to send us the documents returned to you under our letter to you dated January 1975 in order to prepare the necessary transfer and have it registered. We undertake to return the said documents to you.

Our Mr. Suppiah is also making arrangements to raise a loan to pay off the amount due to you on the said three charges and interest and if he is successful in raising the said loan then we would send you all monies due to you under the said three charges and the Draft Discharge of Charge for your approval and execution in due course."

The Bank replied on February 3, stating that they would send the title deeds upon receipt of the amount necessary to clear the overdraft and interest, then $118,561.16. Thereafter the Bank arranged that the respondent executed a further charge over the land for the sum of $30,000. They attempted to register this charge, but were unable to do so because the second appellant had registered a caveat against the land on February 2. On May 8, 1975 the CK Bank wrote to Devan threatening to recall the overdraft facility unless the amount was reduced to $100,000. Devan borrowed $40,000 from a friend and paid this to the Bank, thus reducing the overdraft to $90,893.49.

On June 22, 1975 Suppiah & Singh wrote to the CK Bank asking for the title deeds to the land and undertaking to pay off the amount due to the Bank, details of which they requested. The Bank instructed their solicitors, Yeow & Chin, to deal with the matter, informing them of the amount of $90,893.49 due on the overdraft, as at June 25, bearing interest at the daily rate of $30.20. Yeow & Chin wrote to Suppiah & Singh on June 28, stating that they acted for the CK Bank and the registered owner of the Kulai land, and undertaking upon receipt of the sum of $140,000 within two weeks to discharge the Bank's charges and forward the title deeds. Suppiah & Singh wrote back querying the figure of $140,000, and on July 1, Yeow & Chin replied stating that their client would discharge the charges upon payment of $92,000. On July 5, Suppiah & Singh sent Yeow & Chin a cashier's order for this sum, and duly received the title deeds. On July 5, 1975 the first appellant added to the transfer signed by the respondent on March 30, 1974 attestations to the signatures of the respondent and the second appellant bearing the date July 5, 1975. The same date was added to the confirmation which the respondent had signed on March 30, 1974. The transfer was registered on July 22, 1975. On July 31, 1975 the second appellant executed a transfer of the land in favour of the third appellant, Arul Chandran, an advocate and solicitor in Singapore, purportedly in consideration of the sum of $220,000, but no consideration in fact passed.

In the meantime, the second appellant had obtained from Dr. Das a cheque dated March 25, 1975 for the sum of $149,520 drawn on the Moscow Narodny Bank, which was dishonoured upon presentation. The second appellant sued Dr. Das upon it in the High Court of Singapore, and obtained judgment dated May 5, 1975. The judgment was registered in Johore and execution proceedings were threatened but not in the event taken.

On January 28, 1976 the third appellant made application for sub-division of the Kulai land with a view to development, and on March 4, 1976 Suppiah & Singh, on his behalf, gave the respondent notice to quit. This was followed up by an action for possession, in which judgment was given in the third appellant's favour on August 9, 1976. An application by the respondent for a stay of execution was dismissed and the respondent vacated the land on September 20, 1976. In January 1977 the third appellant's application for sub-division was approved, and in May 1978 he transferred the land to Jet Age Construction Co., a company controlled by the first appellant. The transfer purported to be in consideration of the price of $361,114, but this was not paid, being allowed to stand in the books of the company as a debt due by it. Eventually the land was sub-divided into 70 lots, all of which were transferred to various purchasers. Devan died on May 10, 1981.

The present action was commenced by the respondent on August 30, 1979, after earlier proceedings for similar relief had been struck out as not disclosing a reasonable cause of action. The trial before Abdul Razak J. started on August 12, 1981 and continued with interruptions until November 1, 1981. There was a marked conflict of evidence between the respondent on the one hand and the first and second appellants on the other hand as to what was said in the course of the meeting at the respondent's house on March 30, 1974. The learned trial judge accepted the respondent as a witness of truth and he rejected the evidence of the first and second appellants in all material respects.

The respondent's account of the events of March 30, 1974, as recorded in the judge's notes, was as follows:

"On March 30, 1974 there were three visitors to my house. Deceased was present. He invited them. Now I know they were the 1st defendant, the 2nd defendant and another Indian. Shown P 30. Deceased took them to the study. He introduced me to them and then I knew they were lawyers. The 2nd defendant brought out certain documents. He gave me P 30 – 31. At the time I did not see the letter of March 14, 1974 as mentioned in P 30. I had no idea of the amount of the overdraft at that time, not even an approximate amount. I have heard before March 30 that Dr. Das was indebted to Hongkong & Shanghai Bank in the sum of $110,000/–. Before that date I had learnt that the 1st defendant had to pay the Hongkong & Shanghai Bank about $110,000/–. I had learnt before the date that the 2nd defendant was to pay the 1st defendant that sum of $110,000/–. I knew before the date that it was intended that I should put the land up for security for the two sums. I read P 30 when it was handed to me by the 2nd defendant. When I read it, I saw the word 'transfer' – then I asked the 2nd defendant why the word 'transfer' was there, when it was only going to be a security. He said the security was by way of a transfer. Then I told him that I was not happy. I asked him how do I get it back once transferred to him. He assured me that Dr. Das would pay the debt to the 2nd defendant and I would get the land back. When I said Das would pay the money I mean the sum of $110,000/–. I did not ask him then how the other $110,000/– was to be repaid. The 2nd defendant did not say how I was going to get the land back. I mean he did not say when I was going to get the land back. I asked the 2nd defendant if Dr. Das could not pay back the money, what happens. He said we could sell the land, pay off the debt and the balance of the money could be used to buy some property nearby. Nothing more was said. I was not happy

with what he said because that was the only property I had and I also told him I was holding it for my five daughters. After telling him I had five daughters he asked the other Indian to write on P 31. After the Indian wrote it – (2nd defendant concedes that the manuscript was written at his instructions), the 2nd defendant signed and the Indian also signed it – (2nd defendant concedes it is his signature below the manuscript). When I read it I saw he had put one year within which I was to re-pay the money and get the land back. I asked him why one year has been specified. He told me I can get it back any time I liked. He also said – 'I do not want your land'. I expected then that the sums in (a) and (b) in P 30 would be paid by the 2nd defendant. I felt it would be paid immediately or within a day or two. He did not tell me as to when he was going to pay. I have signed at P 31. That was after I had asked the questions. The 2nd defendant also produced two or three copies of transfer forms. They were not filled up. Some typed papers. I signed the transfer forms. I signed the typed papers too. In the typed papers there were spaces which were empty. There were also two or three blank sheets of papers. I asked the 2nd defendant about the blank papers. He told me that some typewritten letters must accompany the transfer forms, which I signed. Then I gave back all the documents to the 2nd defendant. I had never seen the 1st defendant, and the 2nd defendant and the Indian gentleman before this incident at the house."

The evidence of the first and second appellants was to the effect that Devan, who represented that the Kulai land, though registered in his wife's name, was his own property, desired to sell the land unless the first appellant should succeed in arranging with the HKS Bank at Johore Bahru a loan sufficient to pay off his own overdraft with the CK Bank and also Dr. Das's overdraft with the HKS Bank in Singapore. The first appellant attempted to do this but did not succeed, and at a meeting at Suppiah & Singh's office on March 10, 1974 Devan agreed to sell the land to the second appellant for $220,000, the consideration to be satisfied by paying off the two overdrafts.

On March 30, 1974 the first and second appellants went to the respondent's house with the documents necessary to formalise the bargain. The respondent having read the documents requested a private discussion with Devan. This took place and Devan then told the first and second appellants that the respondent wished to have the right to repurchase the property within one year. The second appellant agreed to this, and the manuscript addition to the Memorandum was then dictated, written down by Sivananthan and signed, as were the other documents. The first and second appellants specifically contradicted the respondent's account of what had been said. The second appellant further deponed that shortly after the meeting the first appellant discovered that the amount due on Dr. Das's overdraft with the HKS Bank was about $121,000. The second appellant then had a meeting with Devan, and it was agreed that the former would ask the first appellant to pay off the whole amount, and that the manner of paying the consideration set out in the Memorandum would be adjusted accordingly. Devan stated that he wished to continue operating his account with the CK Bank, and that he would like to stay on in the property, paying compensation. The second appellant agreed. Devan from time to time informed the second appellant that he had buyers for the land, but nothing came of this.

On February 1, 1975 the second appellant had a further meeting with Devan, who stated that he and the respondent did not have the money to repurchase the property nor could they find any buyer for it. He stated that he wished to continue operating the account at the CK Bank up to the end of June, and to stay on the property till the end of 1975. He agreed with the second appellant to bring the overdraft down to $92,000, which the latter would pay off, the difference between the total sums applied to pay off the two overdrafts and the agreed consideration of $220,000, approximately $6,000, being treated as compensation for continued occupation of the property. The respondent denied any knowledge of any such arrangements between the second appellant and Devan, and the learned trial judge rejected the second appellant's evidence about these arrangements.

The learned trial judge and the Federal Court were at one in holding that the first and second appellants were guilty of fraud in that they falsely represented to the respondent that the transaction of March 30, 1974 was of the nature of a security such as would enable her to redeem the property by repaying the sum of $220,000 at any time, when it was in fact an outright sale coupled with an option to re-purchase the property for that sum within a year, and further that they falsely represented that it was their intention to give effect to the transaction as a security one, when in fact they had no intention of allowing the respondent to redeem the property at any time. Both courts also found that the respondent had been induced by those misrepresentations to enter into the transaction.

The judgments both of Abdul Razak J. and the Federal Court are very lengthy, particularly the former's, and in some respects difficult to follow. Consideration was given, at particularly great length by the Federal Court, to the meaning of the word "fraud" in section 340 of the National Land Code, a matter which at the hearing before the Board was agreed by counsel on both sides to be irrelevant. Abdul Razak J. was clearly moved

by much indignation at what he regarded as highly discreditable conduct on the part of all three appellants, using such epithets as "atrocious", "abominable" and "damnable". After giving judgment he committed all three appellants to prison for two years on the ground that they had committed contempt by conspiring to deceive the court, but this committal was later set aside by the Federal Court. Nevertheless he, and also the Federal Court, correctly directed themselves that the standard of proof of fraud in civil proceedings was the criminal standard of proof beyond reasonable doubt.

The crucial findings of the two courts on the issue of fraud are findings of fact, and it was therefore argued for the respondent that the case was an appropriate one for application of the practice of this Board to decline to review the evidence for a third time where there are concurrent judgments of two courts on a pure question of fact.

In *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy & Ors.*[1] Lord Thankerton set out at page 521 a series of propositions as to that practice and the special circumstances which will justify a departure from it:

"(1) That the practice applies in the case of all the various judicatures whose final tribunal is the Board.

(2) That it applies to the concurrent findings of fact of two courts, and not to concurrent findings of the judges who compose such courts. Therefore a dissent by a member of the appellate court does not obviate the practice.

(3) That a difference in the reasons which bring the judges to the same finding of fact will not obviate the practice.

(4) That, in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law.

(5) That the question of admissibility of evidence is a proposition of law, but it must be such as to affect materially the finding. The question of the value of evidence is not a sufficient reason for departure from the practice.

(6) That the practice is not a cast-iron one, and the foregoing statement as to reasons which will justify departure is illustrative only, and there may occur cases of such an unusual nature as will constrain the Board to depart from the practice.

(7) That the Board will always be reluctant to depart from the practice in cases which involve questions of manners, customs or sentiments peculiar to the country or locality from which the case comes, whose significance is specially within the knowledge of the courts of that country.

(8) That the practice relates to the findings of the courts below, which are generally stated in the order of the court, but may be stated as findings on the issues before the court in the judgments, provided that they are directly related to the final decision of the court."

In the present case the findings on the issue of fraud are not stated in the order of the High Court entering judgment for the respondent, which was affirmed by the Federal Court, but they are related to the final decision and are to be found in the judgments. The reasons given by the two courts for arriving at their findings differ in various respects, but in accordance with proposition (3) that does not warrant a departure from the practice. The only question for consideration is whether any of the conditions for obviating the practice stated in proposition (4) are present in the instant case.

It was argued for the first and second appellants that the case of fraud pleaded by the respondent was not a sufficient foundation for the case ultimately held to be established against them. Their Lordships are of opinion that the relevant pleadings, though by no means of the greatest clarity, did give the first and second appellants sufficient notice that the case against them turned on what took place by way of representations made to the respondent at the meeting on March 30, 1974, and the subsequent conduct of the first and second appellants in relation to the transaction then arrived at. The respondent's evidence did not correspond entirely with the further and better particulars given in her pleadings regarding these representations, and in some respects it went considerably further. Her evidence was, however, broadly on the same lines and it was given without objection. Further it was given on the first day of the trial, namely, August 12, 1981. The first appellant did not give evidence until October 18, 1981 and the second appellant not until October 21. Both took the opportunity to contradict specifically the account of the events of March 30, 1974 given by the respondent. Their Lordships are satisfied that at the time they came to give evidence the first and second appellants were fully aware of the precise representations which the respondent claimed to have been made to her on that occasion, and that they were in no way prejudiced by any deficiencies in the respondent's pleadings, in the sense of being taken by surprise or not being given an adequate opportuni-

ty to deal fully in evidence with the case being made against them.

It was further maintained for the first and second appellants that there was no evidence, or at least no sufficient evidence, upon which Abdul Razak J. and the Federal Court could properly arrive at their findings of fraud. The conduct of these two appellants after the events of March 30, 1974 was treated by both courts as being very material to the question whether they had acted dishonestly on that occasion. There can be no doubt that in certain cases the conduct of a defendant after a particular occasion upon which he is alleged to have made a fraudulent misrepresentation may shed considerable light on the question whether he had a dishonest intention. In this case the actions of the first and second appellants after March 30, 1974, if not satisfactorily explained, were in certain respects capable of casting them in a very dubious light. Particular aspects include the circumstance that Dr. Das's overdraft with the HKS Bank was not paid off till April 27, that a cheque for $149,000 was obtained from him and subsequently sued upon, that Devan's overdraft was not paid off till July 5, 1975 at a time when it stood at approximately $92,000, that the Kulai land was transferred to the third appellant on July 31, 1975, nine days after registration of the respondent's transfer to the second appellant, purportedly for a consideration of $220,000 but actually as a bare nominee and that the land was ultimately transferred to a company controlled by the first appellant.

The first and second appellants offered in evidence explanations of all these matters. The late payment off of Dr. Das's overdraft was because it was more than the $110,000 it was thought to be on March 30. The cheque for $149,000 was obtained from him as payment for repurchase of the property by the respondent. The late payment off of Devan's overdraft was attributable to the agreements made with him in April 1974 and again on February 1, 1975 for variation of the original transaction. The transfer to the third appellant was made because the first appellant was in bad standing with the State authorities and therefore an application by him for approval of sub-division of the land were unlikely to be granted, and the third appellant would be in a better position to obtain such approval. The learned trial judge rejected all these explanations. In particular, he rejected the evidence about the two variations of the original transactions said to have been agreed with Devan. It was argued that the judge had failed to take into consideration properly or at all the correspondence in 1974 and 1975, narrated above, between Suppiah & Singh and the CK Bank and later the firm of Yeow & Chin, which was maintained to be fully consistent with the evidence about the agreed variations.

Having carefully considered that correspondence, their Lordships cannot agree. In particular they regard it as strange, to say the least of it, that there is no suggestion in the course of the correspondence that the second appellant had any interest in the land until Suppiah & Singh wrote to the CK Bank on February 2, 1975 stating that the second appellant had purchased the land subject to the existing charges. There was instead a continuing representation until that date that Suppiah & Singh were acting as solicitors for the respondent. Further, if variations of a subsisting written agreement had been negotiated, a reasonably responsible solicitor might have been expected to write to the other party confirming the precise terms of the agreed variations. No letter containing any reference to the alleged variations was, however, produced.

In the end of the day, the determination upon the issue of fraud turned upon resolution of the straight conflict of evidence between the respondent on the one hand and the first and second appellants on the other hand regarding the events of March 30, 1974. It is to be noted in passing that evidence supporting to some extent that of the first and second appellants was given by Sivananthan, who was also present on that occasion. No reference to his evidence was made either by Abdul Razak J. or by the Federal Court. It appears that they cannot have attributed weight to it. No criticism of this was made by counsel for the first and second appellants, in their Lordships' view rightly, in view of the seven years' passage of time and the fact that Sivananthan plainly took very little interest at the time in what was going on.

In their Lordships' opinion Abdul Razak J. was fully entitled to accept the whole of the respondent's evidence about the events of March 30 and to reject that of the first and second appellants. It is apparent that the latter went to the respondent's house on that day with the full intention of purchasing the property outright. The documents they brought with them were designed for no other purpose. It is equally apparent that the respondent demurred, and it was entirely reasonable that she should do so, since an outright sale would have meant the immediate or at least speedy departure of herself, her husband and her five daughters from the family home. Her evidence was that she was willing to have the property made subject to a security for Dr. Das's overdraft, no

doubt at her husband's persuasion, but it is entirely understandable that she should have been unwilling to go further and sell the property outright. The second appellant in response to her anxieties dictated and signed the manuscript addition, representing to her, so in effect she deponed, that this made the transaction a security one which would enable her to redeem the property at any time upon repayment of $220,000. Abdul Razak J. described the manuscript as a dangling carrot, a false device to induce the respondent to sign the undated transfer so as to enable the first and second appellants to effect the transfer of the land to themselves. This is, in all the circumstances, a credible picture. These appellants were throughout determined on an outright purchase. They achieved that by representing the transaction as a security one, albeit at the cost of giving the respondent an option to repurchase within one year, which in the view of the learned trial judge they never intended to give effect to.

Some confusion was introduced in the course of the evidence by reference to the concept of *"jual janji"*. This is a species of transaction not uncommon in Malaysia under which one party in security of a debt sells and transfers land to the creditor for an agreed price equal to the debt and simultaneously takes an option to re-purchase it at the same price, exercisable within a limited period of say, six months or one year. The purchaser immediately upon payment of the price takes possession of the land, enjoyment of the fruits of which represents the equivalent of interest on the debt, and maintains it until, if ever, the seller exercises his option to re-purchase. It was held by this Board in *Haji Abdul Rahman & Anor.* v. *Mahomed Hassan*[2] that such a transaction, though expressly agreed to be in security for a debt, gave the debtor no real right in the land but merely a contractual one, so that the applicable limitation period for bringing proceedings for recovery of the land was the twelve year period prescribed by the Limitation Enactment for ordinary obligations, not the sixty year period prescribed for actions against a mortgagee to redeem or recover possession of immoveable property mortgaged. Despite some suggestion on behalf of the first and second appellants that this transaction was a *jual janji*, and thus of the nature of a security, the fact remains that it was not expressed to be in security of any debt, and in any event no possession of the land was taken. In their Lordships' view discussion of *jual janji* casts no light upon any issue relevant in the case.

It was argued for the first appellant that even if the findings of fraud against the second appellant were upheld, the learned trial judge and the Federal Court were not entitled to hold that he, the first appellant, was party to the fraud. Their Lordships are of opinion that the whole evidence of facts and circumstances was amply sufficient to justify the finding that both these appellants were jointly involved in bringing about the transaction with the respondent and that they were similarly motivated.

In view of the importance of the outcome of this appeal to both parties, their Lordships have given most anxious consideration to the whole of the evidence, so far as recorded in the judge's notes, and to the relevant documents. They have come to the conclusion that no sufficient grounds have been shown, so far as the findings of fraud against the first and second appellants are concerned, for a departure from the practice whereby the Board refrains from disturbing concurrent findings of fact in the two courts below.

As regards the third appellant, their Lordships were informed in the course of the hearing before them that his counsel and that for the respondent were agreed that his appeal should be allowed by consent, upon the terms that all allegations of fraud against the third appellant were withdrawn, and also any claim against him as allegedly a constructive trustee, and that as between him and the respondent there should be no order for costs here or in the courts below. Their Lordships consider it proper in the circumstances that the third appellant's appeal should be allowed upon these terms. It is abundantly plain that he had no hand whatever in the events of March 30, 1974, which form the basis of the respondent's case of fraud against the other appellants.

It is unnecessary to consider the merits of any of the respondent's other grounds of claim.

Damages

As mentioned at the outset, Abdul Razak J. awarded as damages for fraud the sum of $973,000 with interest at 6% per annum on the sum of $370,260 from July 1975 until July 1982 and interest at 8% per annum on the judgment sum from November 21 1982. The Federal Court affirmed his award.

The sum of $370,260 was arrived at as being an estimate of the value of the Kulai land in July 1975, when the transfer to the second appellant was dated and registered. To this the learned trial judge added $518,364 as being a figure arrived at on the basis that property values generally had appreciated at the rate of 20% per annum over the period from 1975 to 1982, a total increase over the

period of 140%. He added further a sum of $84,000 as being the value in July 1975 of the dwelling house situated on the property. The total of these three sums is $972,624, which was rounded off at $973,000.

Counsel for the first and second appellants challenged the assessment of damages on a number of grounds. In the first place it was maintained that there was no evidence upon which Abdul Razak J. could properly find that the value of the land in 1975 was greater than $220,000, the figure put upon it by a surveyor called by the appellants. The higher values placed upon the land by two valuers and auctioneers called by the respondent were not soundly based on comparables, unlike the evidence of the appellants' witness. The learned trial judge, however, who had a wide experience of dealing with questions as to the value of land in Malaysia, rejected the evidence of the appellants' witness on the grounds that he was not independent, that his instructions had been to state whether he considered $220,000 to have been a reasonable value in 1975, not to give his opinion as to the market value at that time, and that the subjects relied on for comparison were not truly comparable. While it is true that the opinion evidence of the respondent's witnesses was not supported by any satisfactory comparables, the question of what value to accord to the property on the evidence before him was essentially one for the trial judge, and their Lordships are not prepared to say that he was not entitled to reach the conclusion he did upon this matter.

Then it was maintained that the learned trial judge erred in adding to the value which he placed upon the land as at 1975 the value of the dwelling house situated thereon. In their Lordships' opinion there is substance in this contention. The figure of $370,260 was arrived at upon the basis of the price which the land would fetch in the market if sold for development purposes. The existing use value would necessarily have been lower. Development of land would have involved demolition of the dwelling house. Therefore a purchaser who intended to develop the land would have added nothing to the price he was willing to pay in respect of its presence on the land. There is, accordingly, no tenable ground for adding to the value on the basis of a sale for development any element in respect of the dwelling house.

It was next contended that credit should have been given to the amount of $202,000 representing the $92,000 paid by the first appellant to the CK Bank in discharge of Devan's overdraft and $110,000 of the $121,819.80 paid by him to the HKS Bank in discharge of Dr. Das's overdraft. As regards the $92,000, it is to be observed that the overdrawn account was in the name of Devan, not that of the respondent. It appears to their Lordships nevertheless to be right to treat the discharge of the overdraft as being a benefit to the respondent which reduced to that extent the damage suffered by her as a result of the tort committed against her. This is particularly so when it is kept in mind that Devan had a certain beneficial interest in the land and that the respondent is claiming redress for the tort in her own name alone. Further, the overdraft was secured upon the land so as to be a charge upon the respondent's beneficial interest in it. Their Lordships are therefore of opinion that a deduction should be made in respect of the sum of $92,000. The sum of $110,000 is in a different position. The first appellant was guarantor of Dr. Das's overdraft with the HKS Bank, and Abdul Razak J. found as a fact that he paid off the overdraft in his capacity of guarantor and not by virtue of the transaction of March 30, 1974. He did not receive any repayment from the second appellant as provided for in the Memorandum of March 30, 1974. No doubt he would have had recourse against Dr. Das, for what that was worth, but the fact remains that he was under a legal obligation to the Bank, and if the damages were to be reduced by $110,000 he would to that extent receive a benefit to set against his satisfaction of that legal obligation. It would be unjust and contrary to principle to allow him to receive any benefit from his fraudulent transaction at the expense of the respondent, and their Lordships accordingly do not propose to reduce the damages by the sum in question.

It was further argued for these appellants that Abdul Razak J. was wrong to include in the damages any sum in respect of the increment in value which he held would have accrued to the land, had the appellant not been wrongfully deprived of it, between the date of the deprivation and the date of judgment, and in any event that the increment of 140% had no evidential basis and was unjustified. No doubt it is a general rule of law that the damages recoverable for a tort are to be assessed as at the date the tort was committed. But there are many exceptions to that rule, the most notable perhaps being the case of damages for personal injuries caused by negligence, which are assessed so as to take into account all loss suffered up to the date of trial having regard to the value of money at that time. The true test is what is just and reasonable in all the circumstances. The object of damages for the tort of deceit, as for other torts, is to put the injured party into as good a position

financially as he would have been in if the tort had not been committed. In the present case there is no reason to doubt that if the respondent had not been tricked out of her land she would at the date of judgment still have been in ownership and possession of it bearing the value which in ordinary course it would have borne at that time. Further, if these appellants had not succeeded in bringing it about that the land was sub-divided into 70 lots and sold off to *bona fide* purchasers for value, the respondent would have been entitled to have the transaction with her set aside and to recover the land itself on the date that judgment was pronounced. So in their Lordships' opinion the learned trial judge was right in principle to take into account in the assessment of damages the value which the land, if the respondent had not been deprived of it, would have borne at the date of judgment. Special considerations might have arisen if the respondent had been guilty of unreasonable delay in prosecuting her claim, but no suggestion of that has been made.

It remains to consider whether Abdul Razak J. was entitled to find, as he did, that an increment in value of 140% would have accrued to the land between 1975 and 1982. The only relevant piece of evidence before him was a statement by the respondent's expert witness Chong that there had been a boom in property values during a period up to about 1979. The learned judge, however, expressed himself as proceeding on the view that it had become a matter of public and common knowledge that even if there had been no boom the normal annual rate of increase of land prices had always been generally about 20% a year. He said that this had been confirmed by about 700 land reference cases which had come before him over the past 11 months or so throughout Western Malaysia. The Federal Court did not criticise his approach, nor indeed advert to it at all. There can be no doubt that a judge is not entitled to use his own particular knowledge in arriving at an assessment of damages. In the general exercise of his judicial functions he is, however, entitled to rely on what is common and public knowledge. The scope of common and public knowledge may vary quite widely from one country to another. The fact of a fall over a period in the value of money or a rise in the value of land is a matter which is capable of being one of common and public knowledge. As to whether or not it is so in Malaysia is a question upon which their Lordships would hesitate to venture an opinion. The judiciary of Malaysia are the persons best qualified to answer the question. The learned trial judge has found the particular matter to be common and public knowledge there, and his finding has not been criticised by the Federal Court. Their Lordships are not prepared to interfere with that finding and accordingly reject the appellants' argument.

Finally, it was maintained for the appellants that Abdul Razak J. erred in allowing interest at 6% from July 1975 upon the sum representing the then value of the land, in addition to the 140% increment in value, because by doing so he had in substance compensated the respondent twice over for the same element of loss. In their Lordships' opinion there has been no double compensation. The 140% increment compensates the respondent for the capital loss she has sustained through not having the ownership of the land at the date of judgment, whereas the 6% interest compensates her for not having had possession of the land, and thus enjoyment of its fruits, during the intervening period. In the result, the respondent and her family had to live in rented accommodation, with consequent expense, during that period, and it is fair that this should be the subject of compensation. It is the case, however, that the respondent was not dispossessed of the land until September 20, 1976, and it is from that date, not July 1975, that the interest should run.

Their Lordships will advise His Majesty the Yang di-Pertuan Agong that the first and second appellants' appeal against affirmation by the Federal Court of the order of Abdul Razak J. dated July 17, 1982 should be dismissed, and that their appeal against the Federal Court's affirmation of the order of Abdul Razak J. dated November 21, 1982 should be allowed to the effect only of substituting in that order the sum of $797,000 for the sum of $973,000 and the date September 20, 1976 for the date July 1975. As regards costs, the first and second appellants have failed upon the main issue of liability, argument upon which occupied the great bulk of the hearing before the Board, and succeeded upon two fairly minor aspects of their appeal upon quantum of damages. In the circumstances their Lordships consider it fair that the appellants should pay to the respondent seven-eighths of her costs before the Board.

Their Lordships will also advise His Majesty that the third appellant's appeal should be allowed upon the agreed terms.

1st & 2nd appellants' appeal dismissed.
3rd appellant's appeal allowed upon agreed terms.

Solicitors: *Bartletts de Reya; Le Brasseur & Bury.*